Roland Chong Yew Soon & Ors v Majlis Perbandaran Subang Jaya & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–21–30 OF 2006
SURIYADI J
29 JUNE 2006

Administrative Law — Judicial Review — Certiorari — Approving the development of a proposed graveyard and crematorium — Whether requirements of O 53 r 3 of the RHC be complied with before leave application be made ex-parte

Civil Procedure — Certiorari — Application for leave to apply for an order of certiorari to quash the decision of the respondent — Whether requirements of O 53 r 3 must be complied before an application for leave be made against any Public Authority — Whether leave application be made ex parte — Whether notice of application for leave be given not later than three days before hearing date to the Attorney General's chambers

This is an application for an order of certiorari to quash the decision of the Subang Jaya Municipal Council approving the development of a proposed graveyard and crematorium at the Ayer Hitam Forest Reserve in Bandar Putra Permai. The counsel for the applicant was advised to withdraw the application with liberty to file afresh, in view of the fact that his cause papers had not mentioned that he was applying for leave to make this application for judicial review, but he declined. Further, the Federal Counsel appearing for the first and second respondents had also raised an objection that the application was not served on the Attorney General three days before the date of the hearing. The question herein is whether the requirement to obtain leave is a prerequisite before anyone wishes to make an application for certiorari against any Public Authority.

Held, application for certiorari struck out

(1) It is trite law that leave is a prerequisite before anyone wishes to make an application for certiorari against any Public Authority. It is evident from O 53 r 3 of the Rules of the High Court 1980 that the applicant has failed to comply with two prerequisites; firstly, the applicant has not applied for leave. Nowhere in his cause papers did he mention anything about leave. Secondly, the applicant has not given notice for the application for leave to the Attorney General's chambers as required to do so not later than three days before the hearing date (see paras 3–4).

(2) Leave as envisaged above is a statutory requirement and cannot be dispensed with. Without an application for leave, the court could not decide whether there was an arguable case or otherwise (see para 8).

[Bahasa Malaysia summary

Ini adalah suatu permohonan untuk perintah certiorari bagi mengenepikan keputusan Majlis Perbandaran Subang Jaya yang telah membenarkan pembangunan sebuah tapak perkuburan dan krematorium di Hutan Simpanan Ayer Hitam, Bandar Putra Permai. Peguam pemohon diarah untuk menarik balik permohonan itu dengan kebenaran memfailkannya semula atas sebab-sebab kertas permohonan tidak menyebut bahawa dia memohon kebenaran untuk membuat permohonan semakan kehakiman, tetapi dia menolak. Seterusnya, Peguam Persekutuan yang mewakili responden pertama dan kedua juga telah membuat bantahan bahawa permohonan itu gagal diserahkan kepada Peguam Negara tiga hari sebelum hari perbicaraan. Persoalan di sini adalah sama ada kebenaran adalah keperluan asas sebelum seseorang yang ingin membuat permohonan certiorari terhadap mana-mana pihak berkuasa awam.

Diputuskan, permohonan certiorari ditolak:

(1) Adalah menjadi amalan bahawa kebenaran adalah keperluan asas sebelum sesuatu memohon certiorari terhadap pihak berkuasa awam. Adalah jelas berdasarkan A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 bahawa pemohon telah gagal mematuhi dua keperluan asas, yakni, pertama, pemohon tidak memohon kebenaran. Tidak ada di dalam kertas permohonan, penyataan berkaitan dengan kebenaran. Kedua, pemohon telah gagal memberi notis permohonan untuk kebenaran, tidak lewat dari tiga hari sebelum dari tarikh perbicaraan kepada kamar Peguam Negara (lihat perenggan 3–4).

(2) Kebenaran seperti yang tertera di atas adalah keperluan statutori dan ianya tidak boleh diabaikan sama sekali. Tanpa permohonan untuk kebenaran, mahkamah ini tidak boleh memutuskan sama ada terdapat kes boleh dibicarakan atau sebaliknya (lihat perenggan 8).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 198–208.

For cases on application for leave to apply for order of certiorari to quash the decision of the respondent, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1488–1489.

Cases referred to

IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (refd)

Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [1999] 3 MLJ 110 (refd)

Sivarasah Rasiah v Badan Peguam Malaysia & Anor [2006] 1 MLJ 727 (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 (refd)

Legislation referred to

Rules of the High Court 1980 O 53 r 3

TJ Chin (Michael Chow with him) (TJ Chin & Co) for the applicant.
Raja Eileen Soraya (Raja, Darryl & Loh) for the first respondent.
YB Datin Paduka Hajjah Badariah bt Hassan (Selangor State Legal Adviser) for the second respondent.

Suriyadi J:

[1] This application for judicial review as the above preamble suggests was made under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash a decision of the Subang Jaya Municipal Council on 23 December 2005, approving the development of a proposed graveyard and crematorium in the Ayer Hitam Forest Reserve in Bandar Putra Permai, District of Petaling, Selangor Darul Ehsan.

[2] On 16 May 2006 counsel, Mr Michael Hong had appeared for the applicant, TJ Chin and Sumila Shankey with him. Federal Counsel, Raja Eileen had appeared for the first and second respondents. Raja Eileen had raised an objection that the application was not served on the Attorney General three days before the date of the hearing. On 19 June 2006, I suggested to Mr Michael Hong that he withdraw the application with liberty to file afresh in view of the fact that his cause papers had not mentioned that he was applying for leave to make this application for judicial review. Despite my good intentions, Mr Michael Hong had deemed it fit to raise his voice and said that he was not withdrawing his application even though there was an error. It must be stated that this incident was not recorded but as it was still fresh I have no problems in recalling it. In those circumstances, as the papers were not in order I had no alternative but to strike out his application in encl 1.

[3] I believe that it is trite that leave is a prerequisite before anyone wishes to make an application for certiorari against any Public Authority. I refer to the provisions of O 53 r 3 of the Rules of the High Court:

(1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule;

(2) An application for leave must be made ex parte to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on;

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

(4) The judge, may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question

[4] From the above provisions, it is evident that the applicant had failed to comply with two prerequisites:

(1) Firstly, the applicant has not applied for leave. Nowhere in his cause papers did he mention anything about leave.

(2) Secondly, the applicant had not given notice of the application for leave not later than three days before the hearing date to the Attorney General's chambers. The Federal counsel, Raja Eileen had raised this when the parties appeared before me on 16 May 2006.

[5] This requirement for leave is also evident from a look at the various authorities on this point. One such authority is *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 where Zaleha Zahari JCA in her dissenting judgment said (at p 439):

> Order 53 of the rules envisages a two stage process. An applicant must first obtain O 53 r 3(1) which application must be made *ex parte* to a judge-in-chambers, supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, supported by affidavits verifying the facts relied on. The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's chambers O 53 r 3(3) and must at the same time lodge in those chambers copies of the statement and affidavits.
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> … If leave is granted, the applicant must then file the substantive motion within 14 days after the grant of such leave and must serve the same on all persons directly affected by the application not later than 14 days before the date of hearing specified in the substantive motion.

[6] As for the Federal Counsel's appearance, I find Zaleha Zahari JCA (dissenting) views in *Tang Kwor Ham & Ors v Pengurusan Danaharta National Bhd & Ors* very apt in this kind of situation. Zaleha Zahari JCA said:

> Although the rules provide for leave application for judicial review to be made *ex parte,* from the authorities cited there have been several instances where putative respondents have been given the opportunity of being heard, the objections of which is not necessarily confined to arguments on extension of the time frame prescribed by the rules for the filing of an application for judicial review. For example, in *Sivarasah Rasiah v Badan Peguam Malaysia & Anor* [2006] 1 MLJ 727, the respondents to the application for leave was present at the hearing of the *ex parte* application and the appeal there from. Both respondents were heard and the objections were upheld by the judge at first instance. Neither the court of first instance, nor the Court of Appeal, found the presence of the respondents at the application for leave for judicial review, and at the subsequent appeal, objectionable.

[7] Since the applicant has not applied for leave, I need not look into the merits of the application at all and could strike out this application in limine.This is so since even if leave is applied for and I am hearing this application at the leave stage, there is no need to look at the merits of the application at all. Gopal Sri Ram JCA in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* referred to Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 643.

> The whole purpose of enquiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[8] Without an application for leave, I would not be able to decide whether there is an arguable case or otherwise. Leave as envisaged above is a statutory requirement and cannot be dispensed with. The rationale and correctly so could be seen in *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110 where it was argued that it would as a general rule be contrary to public policy and as such an abuse of court process to allow the applicant to evade the provisions of O 53 for protection of the authorities.

[9] The applicant in the above case filed an originating summons against Lembaga Jurutera Malaysia for various declaratory orders. Raus J said that the applicant by filing this originating summons was trying to evade the leave requirement of O 53 of RHC and had accordingly allowed the respondent's application to strike out the applicant's originating summons

[10] To reiterate in the interest of justice I had suggested to the applicant's learned counsel that he withdraw his application with liberty to file afresh in order that the applicant could fulfill all the prerequisites of O 53 that he had failed to comply here. Unfortunately, the applicant's learned counsel seemed to have thought otherwise and as said had even deemed it fit to raise his voice at the Bench. Even though my notes of proceedings are brief, the events are still fresh in my mind since I have prepared these grounds a few days after the date of the decision.

[11] In view of all the above reasons, the applicant had left me with no choice but to strike out his application in encl 1.

Applicant's application struck out in encl 1.

Reported by Asghar Ali Ali Mohamad